can a carrier recover a deficiency when it has been compelled by action of the court to carry at a confiscatory rate. The positions seem reciprocal, but some very nice questions are raised. The court held, *Robinson J.* dissenting, that there could be no recovery by the carrier.

Beginning with the *Knoxville Water Case, 212* U. S. 1 and the *Consolidated Gas Case, 212* U. S. 19, the Supreme Court of the United States has often decreed an experiment to determine what would be the returns from certain rates, without prejudice to the right of the public utility to reopen the case if adequate trial proves them non-remunerative. The most important of these cases are referred to in the instant case. Of these the *Lignite Coal Case, supra,* was one in which the United States Supreme Court, after the experiment, found the trial rates confiscatory. Plaintiff by decree of court was coerced to carry at those rates, it was thereby deprived of its property, can it now recover the loss? The court finds there is no tort liability of defendant. Liability, if any, must be contract. There was no express contract to pay a higher rate, and it seems unreasonable to hold there was an implied one. There is complete absence of any implied consent of defendant to pay further freight bills if the litigation should finally prove the company had a right to a higher rate. His contracts with his customers were probably based on the tariffs he paid, and not on any implied promise to the carrier to pay a higher charge, if after years of litigation it should be decided the tariff was too low. Perhaps the most interesting suggestion of the case is that here is a contract by operation of law, a case of unjust enrichment. The court finds that to allow this would give plaintiffs a remedy against one who has done no wrong, and who would be unable to recoup his loss from those who had really benefited, the consumers of the commodity. What protection, then, shall public utilities have against such deprivation of property. They have sometimes been allowed to charge the higher rate ,giving the public rebate slips, 16 MICH. L. R. 379. The court might of course protect them by the form of the decree. Where one of these means is not permitted it seems to be a case of *dammum absque injuria.*

SALES—IMPLIED WARRANTY OF WHOLESOMENESS—CANNED GOODS.—The plaintiff bought a can of baked beans from the defendant who was a retail dealer. The brand was of a widely known variety. While eating the same the plaintiff broke his tooth on a pebble which was proven to have been among the beans in the can. An action was brought on the implied warranty that the beans were wholesome and fit for consumption. The Code provided that "where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he be the grower or manufacturer, or not, there is an implied warranty that the goods shall be reasonably fit for such purpose." *Held,* for plaintiff. *Ward* v. *Great Atlantic & Pacific Tea Co.,* (Mass. 1918), 120 N. E. 225.

The code is but declaratory of the common law. *Cook* v. *Darling,* 160 Mich. 475, 481. Where the particular purpose is the consumption as food, the food must be wholesome. *Barrington* v. *Hotel Astor,* 171 N. Y. Supp.

840; see cases collected in 16 MICH. L. REV. 555. The difficulty in the principal case is to determine whether the vendee relied on the judgment and skill of the vendor. On this point the courts are in conflict. *Julian* v. *Laubenberger,* 16 Misc. (N. Y.), 646, created an exception in the case of canned goods; the court said: " . . . . the defendant sells a can of food . . . . It is well known and must be well known to both parties, that he has not inspected it, that he is entirely ignorant of the contents of the can, except so far as he had purchased from respectable dealers on the market . . . . if the purchaser desires to protect himself he may ask for an investigation at the time of purchasing, or he may get an express warranty as to the quality of the goods." The dissenting opinion in the principal case takes this view. In *Bigelow* v. *Maine Central Railroad Co.,* 110 Me. 105, the court denied an implied warranty of wholesomeness but admitted that the vendee got a warranty that the food was of "a reputable brand, packed and inspected in accordance with approved methods." These courts no doubt have the correct view on strict interpretation of the principles of the law of sales. The better holding, however, is that of the prevailing opinion, for reasons well stated in *Chapman* v. *Roggenkamp,* 182 Ill. App. 117: " . . . . public safety demands that there should be an implied warranty . . . . as a general rule, in the sale of provisions the vendor has so many more facilities for ascertaining the soundness or unsoundness of the article offered for sale than are possessed by the purchaser to assume the risk." See also, *Sloan* v. *Woolworth,* 193 Ill. App. 620; *Cook* v. *Darling, supra.* It is a strong argument of the prevailing opinion, also, that the implied warranty must be regarded as a necessary inference from "the relation of the parties." It could hardly be expected that the customer should follow the suggestion of the N. Y. court in *Julian* v. *Laubenberger.* It would be impractical to open the can at the store; and it would be equally impractical to ask for an express warranty in all retail purchases when the small purchases are so numerous. It would seem that an implied warranty ought to be imposed from the nature of the retailer's business and the peculiar relation of dealer and customer. Dealers in food should be insurers of wholesomeness whether retailers or otherwise. The public interest so demands. The English courts are in accord with the principal case, *Jackson* v. *Watson,* (1909), 2 K. B. 193.

SPECIFIC PERFORMANCE—STATUTE OF FRAUDS—PART PERFORMANCE—MUTUALITY OF REMEDY.—Defendants entered into an oral contract with the plaintiff for the purchase of a house and lot for $1,800. Defendants paid plaintiff $100, entered into possession of the house, which plaintiff vacated for that purpose, and made extensive changes in the premises which lessened their value Defendants subsequently refused to complete the contract. Bill by the plaintiff for specific performance. *Held,* that, inasmuch as part performance by the purchaser (defendants) took the case out of the statute of frauds so that he might have maintained suit against the vendor (plaintiff), the plaintiff may have relief. *Pearson* v. *Gardner et al.* (Mich. 1918), 168 N. W. 485.

The decision is placed squarely upon the ground of mutuality of remedy.